

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMY KRAUSS,

v.

7:06-CV-153

7:06CV276

RANDALL A. BISCHOFF, et. al.,

Defendants.

THOMAS J. McAVOY
Senior United States District Judge

DECISION and ORDER

Plaintiff commenced the instant medical malpractice action against Defendants in state court. The Attorney General certified that the individual defendants were working within the scope of their duties under a personal services contract with the Army at the time of the incidents alleged in the Complaint and, therefore, removed the matter to this Court pursuant to 10 U.S.C. § 1089(c).

Pursuant to section 1089(c), this action is to be deemed a tort action brought against the United States and is to proceed in accordance with the Federal Tort Claims Act. The United States now moves to be substituted for the individual defendants and to have the case dismissed because, although Plaintiff filed an administrative claim, she did not wait the requisite six months after filing of the administrative claim before commencing this action. 28 U.S.C. § 2765(a). Plaintiff has failed to oppose the motion.

Pursuant to 10 U.S.C. § 1089(c), the government's motion to substitute the United States as the real Defendant in the place of Defendants Randall Bischoff and Mary

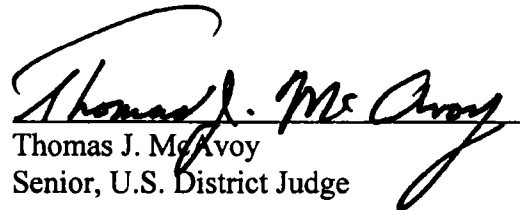
Kowalchuk is GRANTED. The government's motion to dismiss without prejudice pursuant to 28 U.S.C. § 2675(a) is GRANTED because this action is premature.

Lastly, when this matter was removed from state court, the case opened in this court only included the individual defendants and not Defendant OMV. Defendant OMV thereafter attempted to remove to this Court the case as against it. The case against OMV was opened in this court under civil docket number 06-cv-276. The entire state court case (including Defendant OMV) should have been removed to this Court as one action.

Accordingly, the Court *sua sponte* orders that this case (06-cv-153) be CONSOLIDATED with 06-cv-276 with 06-cv-276 as the lead case.

IT IS SO ORDERED.

Dated: April 4, 2006


Thomas J. McAvoy
Senior, U.S. District Judge